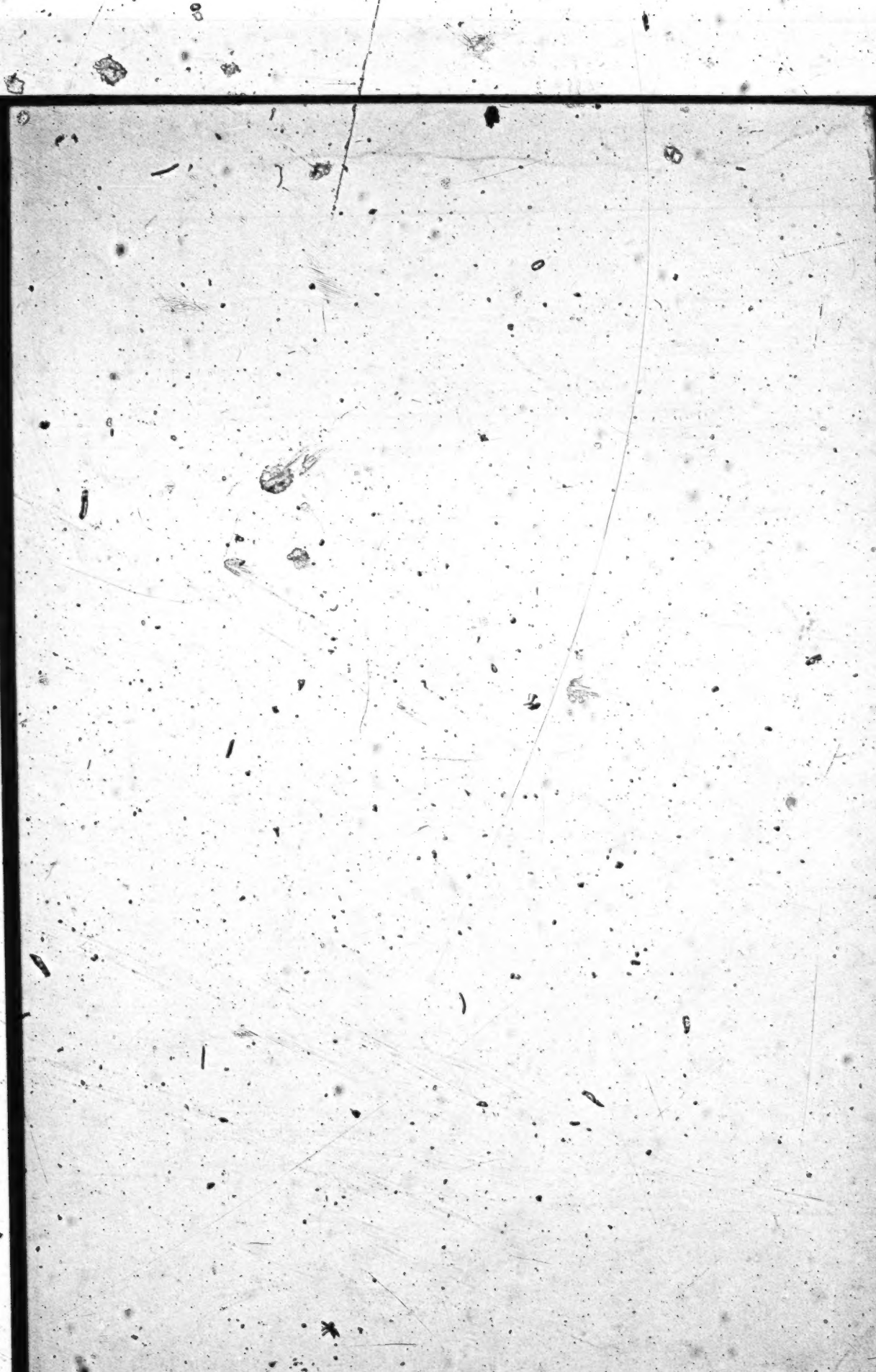

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IN THE

Supreme Court of the United States

NO. 68-5009

OCTOBER TERM, 1971

DONALD FELIX SCHNEBLE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF THE RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent accepts petitioner's jurisdictional statement as an accurate resume of those proceedings which gave rise to this Court's action granting certiorari limited to the question of whether petitioner's conviction was in violation of Bruton v. U.S., 391 U.S. 123, 20 L.ed.2d 476, 88 S.Ct. 1622.

STATEMENT OF THE CASE AND FACTS.

Petitioner's statement of the case and facts as the same appear in his brief defy an intelligent assessment in that they are embraced in a portion of the brief where they could never be said to belong. The alleged facts included therein are irrelevant to the only question posed by this Court's order. The alleged statement of facts constitutes an argument of the cause again on a matter not made the object of this Court's concern. Terminally, the statement of the facts is replete with conclusions which your respondent understands to be exclusively the province of this tribunal to reach.

Accordingly, nothing will be said about it except to observe that it is something which should be struck from the brief for its patent lack of either relevancy or materiality. This is so for the reason that if petitioner's position is found to be within the protective pale of Bruton v. U.S., 391 U.S. 123, 20 L.ed.2d 476, 88 S. Ct. 1622, then his statement of the case and facts is entirely superfluous. If this Court should decide that he does not place himself within Bruton's protection, then he could literally write until his arms fell off and he would fare no better.

ARGUMENT

We agree with petitioner's observation that there are areas of similarity as between his case and that of Bruton v. U.S., 391 U.S. 123, 20 L.ed.2d 476, 88 S. Ct. 1622. Indeed, we may extend the comparison even further and say that there are alarming similarities between petitioner's case, that of Bruton, supra, and that of Delli Paoli v. U.S., 389 U.S. 818, 19 L.ed.2d 70, 88 S.Ct. 126. The salient differences as between Bruton, supra, and Delli Paoli, supra, have their best articulation in this Court's opinion in Bruton, supra. That is to say, this Court found it no longer honest or intelligent to believe that a cautionary instruction separated the cast of guilt by a co-defendant's confession was possible.

In order for petitioner's case to fit within either Bruton, supra, without a judicial blessing or a cautionary instruction, or indeed, Delli Paoli, supra, with such a cautionary instruction, there would have to be (as to petitioner) a confessing co-defendant. It really does not require a great amount of imagination to conclude such is a rational conclusion.

If we still had Delli Paoli, supra, petitioner's case could not be controlled thereby inasmuch as there was no cautionary instruction about which the judiciary need be concerned. Since we no longer have Delli Paoli, supra, but now have

Bruton, supra, we must wonder at just how petitioner seeks to fit himself within its mold.

Calling the Court's attention to its several repeated pronouncements in Bruton, supra, as follows:

> This Court selected from its decision in Pointer v. Tex., 380 U.S. 400, 13 L.ed.2d 923, 85 S.Ct. 1065, that portion which said:
>
> "'that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him'"
> 20 L.ed.2d 479
>
> and
>
> "'a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.'"
> 20 L.ed.2d 479, 480.

This Court again noted in Bruton, supra, that Evans' confession certainly added substantial and maybe even critical weight to the government's case in a form not subject to cross-examination by saying:

> "***Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation."
> 20 L.ed.2d 480.

There is added to the above this Court's further observation in Bruton, supra:

> "'A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand.* * *'"
> 20 L.ed.2d 483,

and

> "* * *Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the

> alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. Pointer v. Texas, supra."

and to say nothing of:

> "* * * Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore.* * *"

Must it not follow, from the above, that if either of these two situations were to have existed in petitioner's trial (had there been a confession given by Snell and Snell not taken the witness stand), this Court would have summarily reversed based upon Bruton, supra, as brought forward by Roberts v. Russell, 392 U.S. 293, 20 L.ed.2d 1100, 88 S.Ct. 1921? That of course must be true because even the Florida Supreme Court, in reconsidering the matter on this Court's mandate found that Snell had suffered the fate condemned in Bruton, supra, as a result of Schneble's confession implicating him. Much has been said by petitioner in

terms of suggestions that Snell actually said a number of things which, given a very charitable, lenient interpretation might constitute a sufficient basis to justify relief under Bruton, supra. Nothing is further from the truth. Snell never implicated either himself or Schneble or anyone else in the killing or, for the matter of that, any other crime. The references made by petitioner to places in the record where this is alleged to have occurred simply do not bear him out in his contention. Respondent would be more than happy to have those portions of the testimony considered in their entirety by this Court. No thinking human could read that testimony and blithely conclude that, as does petitioner here, he now can secure relief therefrom.

Viewed in terms of criminal-smarts, it may be said that Snell either knew nothing or told nothing. It is an absolute certainty that no criminal complicity passed from Snell's lips to anyone so that it in turn could be said to have been used against Schneble. There having been none, it is a matter of absolutely no legal consequence whatsoever that he did not take the witness stand. The confrontation which is the common thread by means of which this Court wove its reversing web around Bruton, supra, simply does not exist in this case no matter who reads it or in what fashion. One cannot confront one who has not accused. You may not cross-examine one who has not been examined. You may not inquire into the bona fides of a confession which does not exist. In short, you may

not seek aid from Bruton when Bruton cannot provide you therewith.

We realize that with the situation being as tenuous as we contend it is, how tempting it must have been for petitioner to air the remainder of his alleged grievances in an attempt to secure favorable consideration from this Court in that his many references are to matters and legal principles far outside the scope of this Court's limiting inquiry of June 29, 1971. Respondent will not launder the matter in kind. To do so would be to cast upon the shoulders of this Court far more than it ever wished to consider.

Suffice it to say that when one considers the individual irrelevant complaints made by petitioner or one takes them in the aggregate, there is simply no way in which so measured they may fill the void which the clear record itself cannot do.

CONCLUSION

Accordingly, respondent respectfully suggests that this Court either deny certiorari as having been improvidently granted or, in the alternative, affirm

the action of the Florida Supreme Court for having met not only this Court's mandate in the cause but as well the clear principle announced in Bruton, supra, and its progeny.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have served copies of the foregoing Brief of the Respondent on petitioner's counsel, the Honorable Clyde B. Wells, P. O. Box 669, DeFuniak Springs, Florida, by mail, this _____ day of September, 1971.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel.